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 13 TERRY D. BEMORE

14 IN THE UNITED STATES DISTRICT COURT
 15 SOUTHERN DISTRICT OF CALIFORNIA

16 TERRY D. BEMORE,)	
)	Case No. 08CV0311-LAB (LSP)
	Petitioner,)
18 v.)	
19 ROBERT L. AYERS, JR., Warden of)	MOTION FOR STAY OF EXECUTION
20 California State Prison at San Quentin,)	OF DEATH SENTENCE
)	
21 Respondent.)	<i>Death Penalty Case</i>
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23 TO: THE HONORABLE LARRY ALAN BURNS, JUDGE

24 COMES PETITIONER through Robert R. Bryan, lead counsel, who, pursuant to Local Rule
 25 HC.3(g)(3), moves for a stay of the death sentence until January 12, 2009, when the habeas corpus pe-
 26 tition is to be filed. Order Setting Deadline for Filing Petition for Writ of Habeas Corpus, Mar. 28,
 27 2008; *see* Order Staying Execution of Death Sentence, Feb. 26, 2008. Even though HC.3(g)(3) refers

1 to a 120-day extension of time, it permits a greater period "upon the showing of good cause." *Id.* The
 2 Court is aware that this case is of great complexity. Further, to require counsel to re-apply for stays in
 3 increments would be an unnecessary expenditure of time in view of the fact that the petition must be
 4 filed in a little over four months.

5 The forthcoming habeas corpus petition will raise various issues of great constitutional signifi-
 6 cance, including:

7 *Fraud of Trial Counsel*

8 Claim 1 Lead defense counsel C. Logan McKechnie (a) fraudulently obtained funds un-
 9 der Penal Code section 987.9, (b) committed perjury in order to mislead the
 10 court into granting funds, and (c) failed to use for the defense substantial funds
 11 provided by the court, and, second counsel Elizabeth Barranco failed to apprise
 12 the court and client of the fraud and misconduct upon learning of same. Due to
 13 the defense misappropriation of funds Petitioner was deprived of essential investi-
 14 gative and expert services, and viable guilt phase, special circumstance and
 15 penalty-phase defenses.

16 *Conflict of Interest of Trial Counsel*

17 Claim 2 Lead defense counsel C. Logan McKechnie had a prejudicial conflict of interest
 18 by converting substantial funds granted under Penal Code section 987.9 to his
 19 personal use rather than for the defense. Due to the conflict and resulting mis-
 20 appropriation of funds, Petitioner was deprived of essential investigative and
 21 expert services, and, viable guilt phase, special circumstance and penalty-phase
 22 defenses.

23 Claim 3 Lead defense counsel had a conflict of interest because he tolerated the fraud of
 24 his subordinate, Charles H. Small, in order to conceal his infidelity from his
 25 wife. Due to the conflict and resulting misappropriation of funds, Petitioner was
 26 deprived of essential investigative and expert services, and, viable guilt phase,
 27 special circumstance and penalty-phase defenses.

28 Claim 4 C. Logan McKechnie, lead defense counsel, had a prejudicial conflict of interest
 29 because he was consumed by a gambling habit that caused him to render ineffect-
 30 uive assistance of counsel to Petitioner.

31 Claim 5 C. Logan McKechnie, lead defense counsel, had a prejudicial conflict of interest
 32 due to his racism against Petitioner, an African American.

33 Claim 6 The cumulative effect of the conflicts of interest of Logan McKechnie, including
 34 his gambling, fraud and racism, deprived Petitioner of the rights guaranteed by
 35 the Fifth, Sixth, Eighth, and Fourteenth Amendments.

Ineffective Assistance of Trial Counsel

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| Claim 7 | Petitioner's trial counsel failed at the guilt and special circumstance phase to (a) advise Petitioner of the availability of viable mental defenses, (b) investigate and present the mental defense of his inability at the time of the homicide to form the required mental states to be guilty of murder and robbery, (c) investigate and present the defense of insanity, and (d) request related instructions. |
| Claim 8 | Defense counsel were prejudicially ineffective in having accepted the prosecution theory that the deceased was the victim of a torture-murder spanning a considerable period of time, when in fact there was available evidence that the killing occurred rapidly, did not involve torture, was the product of an insane frenzy, was not premeditated, and did not involve knives allegedly linked to Petitioner. |
| Claim 9 | Defense counsel failed to investigate, seek a hearing and present evidence that Petitioner was mentally incompetent during crucial pretrial and trial proceedings. |
| Claim 10 | Trial counsel's determination to present an alibi defense was ineffective because: 1) counsel failed to conduct an adequate investigation of petitioner's alibi with respect to its veracity and tenability, resulting in the presentation of a defense that was not credible to the jury; and 2) counsel failed to adequately investigate and consider available defenses, including viable mental state defenses, and thus failed to effectively advise Petitioner. |
| Claim 11 | Defense counsel were prejudicially ineffective during jury selection as a result of a lack of reasonable preparation and failure to conduct an adequate <i>voir dire</i> examination, resulting in a jury that was unable to fairly decide the case. |
| Claim 12 | Trial counsel were ineffective at the guilt phase for failing to listen to the untranscribed tape recorded interview of a key prosecution witness, Latonya Wadley, concerning her alleged photo line-up identification of Petitioner as the individual involved with the homicide, and thus were unaware of its unreliability. |
| Claim 13 | Trial counsel were prejudicially ineffective in failing to move for a mistrial based upon juror Augustin Albarran's out-of-court timing experiment conducted during guilt-phase deliberations, which resulted in his rejection of the alibi defense. |
| Claim 14 | Trial counsel were ineffective at the penalty phase for failing to adequately investigate the uncharged, alleged rape of Zelda Mae Carlton, and failing to move to exclude the prejudicial evidence due to its inherent unreliability because the witness had undergone hypnosis regarding the incident. |
| Claim 15 | Trial counsel were ineffective at the penalty phase in failing to object to the prejudicial hearsay testimony of Sarah E. Parker, regarding statements of the alleged rape victim. |
| Claim 16 | Petitioner's counsel were prejudicially ineffective for failing to (a) investigate pertinent facts, (b) disclose to him all relevant facts and defenses, (c) give him |

an informed choice as to defenses, (d) be adequately versed in the relevant law, (e) concealing from the court and jury facts that would have materially affected the outcome of the case, (f) prepare and present all viable defenses at the guilt and penalty phases, (g) not disclosing to the client and court conflicts of interest, and, (h) failing to withdraw from the case due to the conflicts, the cumulative effect of which deprived Petitioner of the rights guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments.

Brady Error/Prosecutorial Misconduct

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| Claim 17 | Richard L. Cooksey, deputy district attorney investigator, gave false and/or misleading testimony with respect to the unreliable photo line-up identification of Petitioner by Latonya R. Wadley, in violation of <i>Brady v. Maryland</i> , and the prosecutor committed prejudicial misconduct in failing to correct the error because he knew or should have known of the falsehood. |
| Claim 18 | Petitioner was prejudiced by the prosecutor's (1) violation of his duty under <i>Brady v. Maryland</i> in failing to disclose favorable treatment provided to witnesses, including but not limited to, Troy Patterson, Echo Ramey, Kim Strickler, Latonya Wadley, and Glen Heflin, (2) misrepresentation to the court and jury that no such benefits were granted, and (3) failure to correct false and/or misleading testimony. |
| Claim 19 | The prosecutor committed prejudicial misconduct in falsely arguing to the jury that Petitioner formed the requisite intent with respect to the first degree murder and related special circumstances, since he himself referred to Petitioner as "bug-shit crazy" during the time of the homicide. |

Juror Misconduct

- Claim 20** A juror, Augustin Albarran, committed prejudicial misconduct by conducting an out-of-court timing experiment during guilt-phase deliberations to test the validity of the defense theory of alibi.

Trial Court Errors

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| Claim 21 | The trial court erred in failing to adequately question an alternate juror, Beatrice Darnell, concerning her observation of Petitioner in prison garb, manacled and handcuffed, and whether such information was related to the jury panel. |
| Claim 22 | The trial court erred in refusing to excuse juror Edgar Zerr due to his simultaneous involvement with the prosecution and law enforcement as a witness on another matter. |
| Claim 23 | The trial court erred at the penalty phase in denying the defense motion to exclude the hearsay testimony of Cynthia A. Moreno regarding statements of the alleged rape victim |

State Interference With Petitioner's Right to Appeal

- Claim 24** Petitioner's confinement and sentence are illegal, unconstitutional and void under the Sixth Amendment, the due process clause of the Fifth Amendment and the due process clause and equal protection clause of the Fourteenth Amend-

ment of the United States Constitution and under Article I, Sections 7 and 15 of the California Constitution because his right to speedy post-conviction remedies has been violated by excessive delay caused by the state in appointing counsel and in interfering with the attorney-client relationship.

Claim 25 Matthew Newman, appointed counsel on state appeal, has provided prejudicially ineffective representation to Petitioner on direct appeal by: (a) wrongfully conceding the torture special circumstance, with neither Petitioner's permission nor prior knowledge; (b) joining the state in its argument against Petitioner by conceding that the torture special circumstance was supported by the evidence, thereby admitting intent, premeditation and malice; (c) refusing to withdraw his special circumstance concession after Petitioner objected and requested he do so; (d) failing to raise meritorious issues on appeal, even though strongly recommended by the California Appellate Project, a capital resource center; (e) inadequately briefing issues; and (f) agreeing to present oral argument to the California Supreme Court even though he has sided with the state against the client.

Claim 26 Matthew G. Newman, state-appointed appellate counsel who simultaneously functioned as a criminal prosecutor, had a prejudicial conflict of interest in representing Petitioner.

Claim 27 The record which was before the California Supreme Court, standing alone and especially when viewed in light of the new evidence presented herein, supports the conclusion that trial counsel was prejudicially ineffective in *voir dire*, and this Court erred in its decision that trial counsel were competent.

Claim 28 The California Supreme has denied Petitioner his constitutional right to (a) competent and conflict-free counsel on direct appeal, (b) reasonable access to the courts, and (c) a fair and meaningful review of on appeal.

Innocence

Claim 29 Petitioner is innocent of first degree murder, the special circumstance findings of robbery and torture, and of the facts and assertions resulting in the conviction and death judgment.

Other Issues

Claim 30 The district attorney's death penalty charging practices are unconstitutionally arbitrary, capricious, and discriminatory.

Claim 31 Petitioner's conviction and death sentence violate international law.

Claim 32 The execution of Petitioner after lengthy confinement under sentence of death would constitute cruel and unusual punishment in violation of his state and federal constitutional rights.

1 WHEREFORE, Petitioner requests a stay of the execution of his death sentence until January
 2 12, 2009, the due date for filing the habeas corpus petition, and for such other relief as the Court may
 3 deem appropriate.

4 DATED: August 6, 2008

5 Respectfully submitted,

6 
 7 ROBERT R. BRYAN
 8 Lead counsel for Petitioner,
 9 Terry D. Bemore

10
 11 **DECLARATION OF SERVICE BY MAIL**

12 I declare that I am over 18 years of age, not a party to the within cause; my business address is
 13 Law Offices of Robert R. Bryan, 2088 Union Street, San Francisco, California 94123-4117. Today I
 14 have served a copy of the attached

15
 16 **Motion for Stay of Execution of Death Sentence**

17 electronically, and/or by placing a copy of same in the United States Mail, postage pre-paid and prop-
 18 erly addressed, to:

19
 20 Garrett Beaumont
 21 Deputy Attorney General
 22 110 West "A" Street, Suite 1100
 23 P.O. Box 85266-5299
 24 San Diego, CA 92186-5266

Jessica Harry
 Death Penalty Law Clerk
 U. S. District Court, Southern District
 880 Front Street, Suite 4290
 San Diego, CA 92101-8900

25 I declare under penalty of perjury that the foregoing is true and correct.

26 Executed on this the 6th day of August, 2008, at San Francisco, California.

27 
 28 ROBERT R. BRYAN
 Lead counsel for Petitioner,
 Terry D. Bemore